# How to Quantify a Proportionate Financial Punishment in the New EU Rule of Law Mechanism?

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## Finally – Conditionality

After long years of debates and various (better and worse) drafts and recommendations, on 16 December 2020, the "Regulation on a general regime of conditionality for the protection of the Union budget" has finally been adopted by the European Parliament (EP). In the present blog post we are not going to deal with the question of which of the former drafts was the best or whether the Conclusions of the European Council are illegal and/or ineffective (see e.g. here, here and here; as well as for a "response" of the EP here). We share many of the concerns but wish to make the most of what we are left with under the new legal framework. The text of the Regulation itself allows for two directions: either it can become a purely anti-corruption measure (authoritarian Member States of the EU would prefer this reading) or it can develop into a real rule of law mechanism (for which just an explicit and generic motivation was the fight against corruption). The latter reading is supported by the fact that such anti-corruption measures already exist (and they are rather ineffective).[1)]Cf e.g. the ineffective application of suspension of payments according to Art 142 a) Common Provisions Regulation on the European Regional Development Fund etc.

We would like to support the second (extensive) reading of the Regulation as we are convinced that the breach of the principles of the rule of law "affect or seriously risk" the Union budget in manifold ways. Therefore, the understanding of "a sufficiently direct way" linking the breach with the Union budget will have to be necessarily broad. Following this understanding we show how the exact amount of the proportionate financial punishment (in the terminology of the Regulation „measure") can be established. To be more precise, we suggest that the principle of a proportionate financial measure enshrined in the new EU rule of law mechanism should be informed by an improved EU Justice Scoreboard (EUJS) drawing on rule of law indices. Thereby, the sensitive matter of determining the amount could be supported also by quantitative data. This is important, because the Commission will face high political pressure when acting under the new rule of law mechanism. Having the possibility to rely on an improved EUJS which presents clear data on rule of law breaches in EU Member States based on independent expert opinions, would significantly strengthen the position of the Commission against charges of politically motivated action.

# Proportionality based on an improved EU Justice Scoreboard

Recital 18 of the Regulation states that

> "[t]he principle of proportionality should apply when determining the measures to be adopted, in particular taking into account the seriousness of the situation, the time which has elapsed since the relevant conduct started, the duration and recurrence of the conduct, the intention, the degree of cooperation of the Member State concerned in putting an end to the breaches of the principles of the rule of law, and the effects on the sound financial management of the Union budget or the financial interests of the Union."

Proportionality has become an important principle of European public law and doctrinal analyses certainly are not lacking. Yet, the PSPP judgment of the Bundesverfassungsgericht has wittingly shown how controversial proportionality can be doctrinally speaking. Politically sensitive topics such as the new rule of law mechanism are, one might say, particularly prone to evoke similar disputes on determining the correct standard of proportionality. This provides ground for insecurity.

We suggest that for establishing proportionality not only doctrinal analyses, but also tools of empirical constitutional law should be included in the evaluation. Doctrinal-legal analysis is, of course, a necessary step in establishing whether a breach of the rule of law can be established, and how serious it is. However, additionally to this, quantification of breaches through rule of law indices could make the assessment more robust, especially concerning the seriousness of rule of law breaches. Doctrinal analysis can be useful in order to establish whether a breach of the principle of the rule of law exists.[2)]According to Art 3 and Art 4 (2) of the Regulation. Yet, it is difficult to say based only on doctrinal-legal analysis whether the financial punishment ("appropriate measures")[3)]According to Art 4 (1) and Art 5 (esp. para 3) of the Regulation. should be e.g. 10% or 25% of the payments.[4)]According to Art 5 (1) lit. a) iv of the Regulation "a suspension or reduction of the economic advantage under an instrument guaranteed by the Union budget". Cf. similarly concerning reductions or corrections according to Art 5 (1) lit. b) iii and iv of the Regulation. For this purpose, the quantification of the breaches in the form of a rule of law index can be useful. The quantified grading in a rule of law index could suggest (based on a pre-determined table) the exact percentage of the financial punishment. This would be a transparent way for quantifying proportionality. With minor changes, the EUJS could be developed into such a quantitative tool, helping the cause of the rule of law efficiently within the EU.

The Regulation already contains an unspecified reference to the EUJS when mentioning it as one of the instruments developed by the EU to promote the rule of law. Precisely the statement (in recital 14 of the Regulation) holding that the "proposed mechanism complements these instruments" (such as the EUJS) is the

legal basis which gives the EUJS a more prominent role. This role, however, can only be of use, if the EUJS itself is improved. Three changes are necessary to this end.

(1) The EUJS needs to bury the obsession with hard data, counting how many computers a Member State has available in the judiciary. Judicial independence does not depend on whether the judge has a computer or not. Such a narrow focus must be given up, or at least the tools of the analysis should be broadened. Qualities of a legal system, and thus also the rule of law (and breaches thereof), cannot be based merely on hard data. Neither it is enough to only include surveys of the general public and companies on the independence of the judiciary (which is albeit not detrimental either).

(2) The main advantage of rule of law indices is that they can aggregate a list of data into a single number (or a few numbers) allowing for a clear and precise evaluation of the rule of law. So far, the EUJS cannot offer a single numerical value which would inform us about the status quo of the respect for the rule of law in the Member States. It is, however, of utmost importance to clearly highlight if a Member State does not fulfil the requirements of the rule of law – and we also need to know by how much it falls short. The EUJS should be able to provide this information.

(3) To improve the EUJS significantly it would be important, similar to other rule of law indices, to include expert opinions. Especially in countries with rule of law discrepancies, it is questionable whether information (hard data as well as qualitative analysis) provided by the respective government is reliable. Therefore, the selection of experts must focus on credentials which guarantee independence (e.g., scholarly achievements, – if there are no doubts about the independence of the judiciary – higher judicial position, or alike). For each Member State several experts, at least five, preferably more than ten, should be selected, and outlier questionnaire responses (numerical values) should automatically be excluded. As to the concrete procedure of selecting the experts, there are various possibilities. (a) The first option is that Member State governments pick the experts, but those experts are then excluded from evaluating their own countries. This is the model applied by the Venice Commission. Even though the respective country experts are excluded from drafting an opinion on “their” country, nomination of experts by respective governments is problematic in terms of potential bias: Experts from authoritarian EU Member States can contaminate the whole process. Therefore, we have a preference for either the second or the third option (or a combination thereof): (b) The second option is to select the experts by the European Commission through an informal discovery process (either head-hunting by the Commission or an open call for experts), based on a list of criteria. This is the expert selection method that the above-mentioned rule of law indices actually apply. (c) The third option is to have an open call (based on a list of professional criteria), and then have interviews that are open to the public conducted by a committee of the European Parliament, and then finally have the experts selected through a parliamentary vote. This lends the strongest legitimacy to the experts, but procedurally it is very cumbersome. Similar methods are usually applied for the selection of candidates for judicial positions – see the Senate hearings in the US or the selection process of the judges of the

European Court of Human Rights where the Parliamentary Assembly of the Council of Europe plays an active role.[5)]For further details of possible methods of expert selection, see András Jakab and Lando Kirchmair, How to Make Sense of the New EU-Budget Rule of Law Mechanism by Developing the EU Justice Scoreboard into a Rule of Law Index. Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way, *German Law Journal* (forthcoming 2021) page 20, available at SSRN.

## Wide Rule of Law Mechanism vs Narrow Anti-Corruption Mechanism

Whether the new mechanism will be a specific anti-corruption tool or a more general protection of the rule of law, i.e. whether the new mechanism will have a quite narrow field of application or will be generally applicable, depends on the Commission and subsequently the CJEU. The Commission could make charges of politically motivated action even less plausible by ensuring a sound evaluation of the breach of the rule of law by improving the EUJS. If the EUJS would include independent expert opinions and a detailed definition of the rule of law via a questionnaire answered by experts, the Commission can safely counter accusations of double standards and non-equal treatment of Member States, which have been “underlined” as potentially problematic by the European Council Conclusions.

References

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